

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



Original  
76-7408

To Be Argued by  
James W. Lamberton

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 76-7408

G. T. FLAMMIA,

Plaintiff-Appellee,

-against-

OSG TAP AND DIE, INC.,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT



CLEARY, GOTTlieb, STEEN & HAMILTON  
One State Street Plaza  
New York, New York 10004  
(212) 344-0600  
Attorneys for Defendant-Appellant  
OSG Tap and Die, Inc.

JAMES W. LAMBERTON

Of Counsel

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities . . . . .	iii
Preliminary Statement . . . . .	1
Issues Presented for Review . . . . .	2
Statement of the Case . . . . .	3
Statement of Facts . . . . .	6
Argument . . . . .	17
I. The Alleged Agreement Between Flammia and OSG was Barred by the Statute of Frauds, N.Y.G.O.L. § 5-701(10), and the District Court Erred in Holding that there were Memoranda Sufficient to Satisfy the Statute . . . . .	17
A. The District Court Improperly Relied Upon Letters Prepared by Plaintiff and not Subscribed by Defendant . . . . .	18
B. The Writings Considered by the District Court were Insufficient to Satisfy the Statute of Frauds . . . .	23
II. The District Court Abused its Discre- tion in Admitting as an Expert with Respect to the Valuation of Services a Witness who had no Experience in Similar Transactions and the Court Erred in Granting Recovery Based on the Value of Plaintiff's Services to OSG . . . . .	28
A. The Admission of Plaintiff's Expert Testimony was an Abuse of Discretion . . . . .	28

	<u>Page</u>
B. The District Court Failed to Consider the Market Value of Flammia's Services and thereby Applied an Improper Measure of Damages . . . . .	30
III. The District Court's Finding of \$130,000 in Damages was Clearly Erroneous . . . . .	34
Conclusion . . . . .	40
Appendix A (New York General Obligations Law § 5-701(10)) . . . . .	42

# TABLE OF AUTHORITIES

## Cases Cited

## Page

<u>Barrett v. Lang</u> , 43 App. Div. 35, 276 N.Y.S. 297 (1st Dept. 1934), aff'd, 269 N.Y. 511 (1935).....	27
<u>Behrman v. Peoples Camp Corp.</u> , 30 App. Div.2d 973, 294 N.Y.S.2d 658 (2d Dept. 1968), aff'd, 25 N.Y.2d 920, 304 N.Y.S.2d 853 (1969).....	19
<u>Black v. Vaeth</u> , 55 Misc.2d 502, 285 N.Y.S.2d 557 (City Ct. Oneida Co. 1967).....	27
<u>Blackburn &amp; Co. v. Park</u> , 357 F.2d 525 (2d Cir. 1966).....	36
<u>Bloomgarden v. Coyer</u> , 479 F.2d 201 (D.C. Cir. 1973).....	26
<u>Brause v. Goldman</u> , 10 App. Div.2d 328, 199 N.Y.S.2d 606 (1st Dept. 1960), aff'd, 9 N.Y.2d 620, 210 N.Y.S.2d 225 (1961).....	18
<u>Carroll v. American Federation of Musi- cians</u> , 295 F.2d 484 (2d Cir. 1961).....	28
<u>Crabtree v. Elizabeth Arden Sales Corp.</u> , 305 N.Y. 48, 110 N.E. 551 (1953).....	19
<u>Fowler v. Hoschke</u> , 53 App. Div. 327, 65 N.Y.S. 638 (2d Dept. 1900).....	27

<u>Havenfield Corp. v. H. &amp; R. Block,</u> <u>Inc.</u> , 509 F.2d 1263 (8th Cir.), cert. denied, 421 U.S. 999 (1975).....	29, 31, 37
<u>Intercontinental Planning Ltd. v.</u> <u>Daystrom, Inc.</u> , 24 N.Y.2d 372, 300 N.Y.S.2d 817 (1969).....	23
<u>Jenkins v. United States</u> , 307 F.2d 637 (D.C. Cir. 1962) (en banc).....	29
<u>Jones V. United States</u> , 387 F.2d 1004 (10th Cir. 1967), cert. denied, 392 U.S. 927 (1968).....	29
<u>Karlin v. Avis</u> , 457 F.2d 57 (2d Cir.), cert. denied, 409 U.S. 849 (1972).....	19
<u>King v. Deutsche Dampfs-Ges</u> , 523 F.2d 1042 (2d Cir. 1975).....	28
<u>Klein v. Smigel</u> , 44 App. Div.2d 248, 354 N.Y.S.2d 117 (1st Dept. 1974), aff'd, 36 N.Y.2d 809, 370 N.Y.S.2d 897 (1975).....	18, 26
<u>Knaus v. Kreuger Brewing Co.</u> , 142 N.Y. 70 (1894).....	36
<u>Matarese v. Moore-McCormack Lines, Inc.</u> , 158 F.2d 631 (2d Cir. 1946).....	32

Minichiello v. Royal Business Funds

Corp., 18 N.Y.2d 521, 277 N.Y.S.2d

268 (1966), cert. denied, 389

U.S. 820 (1967)..... 18, 23

Morris Cohon & Co. v. Russell, 23 N.Y.2d

569, 297 N.Y.S.2d 947 (1969)..... 19-20, 23-24

Motorola, Inc. v. Fairchild Camera

and Instrument Corp., 366 F.Supp.

1173 (D. Ariz. 1973)..... 29

Naimoli v. Massa, 81 Misc.2d 431,

366 N.Y.S.2d 573 (City Ct. 1975)..... 32

Neill v. Leonard M. Drilling Co.,

426 F.2d 487 (5th Cir. 1970)..... 39

Olsen v. Realty Hotel Corp., 210 F.2d

785 (2d Cir. 1954)..... 29

Orvis v. Higgins, 180 F.2d 537 (2d Cir.),

cert. denied, 340 U.S. 810 (1950)..... 23

Robbins v. Frank Cooper Associates,

19 App. Div.2d 242, 241 N.Y.S.2d

259 (1st Dept. 1963), rev'd, 14

N.Y.2d 913, 252 N.Y.S.2d 318 (1964)..... 30-31, 33

Solin Lee Chu v. Ling Sun Chu,

9 App. Div.2d 888, 193 N.Y.S.2d

859 (1st Dept. 1959)..... 19

Sperry-Rand Corp. v. A-T-O, Inc.,

447 F.2d 1387 (4th Cir. 1971,  
cert. denied, 405 U.S. 1017  
(1972))..... 39

Tropea v. Shell Oil Co., 307 F.2d

757 (2d Cir. 1962))..... 28, 29

United States v. Bermudez, 526

89 (2d Cir. 1975))..... 29

United States v. Horsfall, 270 F.2d

107 (10th Cir. 1959))..... 39

United States v. Twin City Power Co.,

248 F.2d 108 (4th Cir. 1957),  
cert. denied, 356 U.S. 918  
(1958))..... 40

United States v. United States Gypsum Co.,

333 U.S. 364 (1948))..... 35

Yonofsky v. Wernick, 362 F.Supp. 1005

(S.D.N.Y. 1973))..... 26

Other Authorities

Statute

New York General Obligations

Law §5-701..... 4, 5, 17, 18-22, 23-27, 40

Federal Rules

Fed. R. Evid. 702..... 29

Miscellaneous

Bangser, Negotiations and Planning,

in Business Acquisitions:

Planning and Practice 7 (Herz &

Beller, ed. 1971)..... 36

50 N.Y. Jur., Restitution and

Implied Contracts

§§106, 107..... 32

1949 Report of the New York Law

Review Commission 615..... 22-23

3. J. Weinstein, Weinstein's Evidence

§702[1] (1975)..... 29

7. J. Wigmore, Evidence §1923 (3d

ed. 1940)..... 29

1 S. Williston, Contracts §3A (3d ed.

1957)..... 32

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT  
Docket No. 76-7408

---

G. T. FLAMMIA,

Plaintiff-Appellee,

-against-

OSG TAP AND DIE, INC.,

Defendant-Appellant.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

---

BRIEF FOR DEFENDANT-APPELLANT

Preliminary Statement

This is an appeal, pursuant to 28 U.S.C. § 1291, from the order of the district court, Honorable Thomas C. Platt, entered on July 15, 1976 (including the prior interlocutory order of the district court, entered on October 6, 1975, denying defendant-appellant's motion for summary judgment and striking defendant-appellant's Statute of Frauds defense), granting plaintiff-appellee \$130,000 in damages against defendant-appellant. The district court's opinion, dated July 14, 1976, is unreported

but is printed in the Appendix at 582A\*; the opinion of the district court denying defendant-appellant's motion for summary judgment and striking its Statute of Frauds defense is reported at 401 F.Supp. 1121 and printed at 88A.

#### ISSUES PRESENTED FOR REVIEW

1. A. Since the New York Statute of Frauds provides that contracts to pay compensation for services rendered in connection with the sale of a business are void unless evidenced by a writing subscribed by the party to be charged therewith, did the court below err in considering letters subscribed by the plaintiff in determining compliance with the requirement of writings sufficient to meet the Statute?

B. Where the writings considered by the district court as compliance with the Statute of Frauds, taken with the deposition testimony considered by the court in deciding a motion for summary judgment, showed only that the plaintiff expected a long-term executive position for his services in contacting an acquisition candidate on defendant's behalf, did the court below err in finding that plaintiff was employed and performed services as a finder for the defendant?

---

\* Citations followed by "A" refer to material in the Joint Appendix filed with this brief.

2. A. Did the court below abuse its discretion in refusing to strike the testimony of plaintiff's expert as to finder's fees where the expert witness had never participated in a transaction involving a finder's fee and had no knowledge of the fees customarily charged in merger and acquisition work?

B. Did the court below err in finding damages based upon the special value of plaintiff's services allegedly received by defendant rather than upon the reasonable value of plaintiff's services in the marketplace?

3. Was the damage finding of \$130,000 by the court below clearly erroneous where the testimony of plaintiff's expert upon which the court relied as to various elements of damage failed to distinguish between finder's and broker's services, was unsupported by the textual authority which it was based upon, contained duplicative elements of damage and was contradicted by defendant's expert, an investment banker experienced in merger and acquisition work?

#### STATEMENT OF THE CASE

This litigation arises out of a claim by plaintiff-appellee G. T. Flammia for compensation for his services as a finder in connection with the purchase by defendant-appellant O.S.G. Tap and Die, Inc. (OSG) of Sossner Tap & Tool Corporation

from MITE Corporation (MITE) or for the breach of a joint venture agreement between plaintiff and defendant.

Plaintiff instituted this action against defendant OSG and against then-defendant MITE in the Supreme Court of the State of New York in 1973. The complaint asked for \$200,000 as the quantum meruit value of plaintiff's services as a finder. Subsequently, the defendants removed this diversity action to the United States District Court for the Eastern District of New York, pursuant to 28 U.S.C. §§ 1332, 1441 and 1446.

On February 26, 1975, defendants moved for summary judgment on the grounds that the alleged agreement to compensate plaintiff for his services was barred by the New York Statute of Frauds, N.Y. General Obligations Law § 5-701(10). Plaintiff filed a cross-motion to dismiss defendants' affirmative defense based on § 5-701(10).\*

In an opinion dated October 6, 1975 and reported at 401 F.Supp. 1121 (E.D.N.Y. 1975), Judge Platt denied defendants' motion for summary judgment and granted plaintiff's motion to dismiss the Statute of Frauds defense. While a joint venture theory had not been pleaded in plaintiff's complaint and was first raised in response to defendants' motion for summary

---

\* Plaintiff's motion also sought dismissal of defenses based upon the Illinois Statute of Frauds and the New York Real Property Law. These defenses were stricken by the district court and are no longer at issue in this action.

judgment (595A), the district court concluded that there was sufficient evidence supporting plaintiff's claim that he and defendant OSG were joint venturers, a claim that was not covered by the Statute of Frauds, to preclude a grant of summary judgment to defendants. The court further determined that, in any event, correspondence between plaintiff and defendant OSG was sufficient to satisfy the requirements of § 5-701(10). Finally, the court granted plaintiff leave to file an amended complaint setting forth his joint venture claim, which plaintiff did on October 17, 1975.

Trial before the district court, without a jury, commenced on December 15, 1975 to determine the existence of a joint venture contract and to assess damages on plaintiff's quantum meruit claim as a finder (582A-83A). Testimony was taken on December 15, 16 and 17, 1975; February 6, 1976; February 27, 1976; and April 16, 1976. At the conclusion of the trial, the parties stipulated to the dismissal of the action as to defendant MITE and MITE was dropped as a party by order of the Court on May 19, 1976.

In a memorandum and order dated July 14, 1976, Judge Platt, stating that there were "serious questions" as to the existence of a joint venture contract, failed to find the existence or breach of such an agreement. Nevertheless, based on his previous interlocutory holding that there were sufficient writings between the parties to meet and overcome defendant's

Statute of Frauds defense, Judge Platt awarded recovery to the plaintiff of \$130,000 on a quantum meruit basis for services allegedly requested by defendant OSG and performed by plaintiff as a finder.

Defendant OSG filed its Notice of Appeal on August 16, 1976. No cross notice of appeal has been filed by plaintiff.

#### STATEMENT OF FACTS

##### A. The Parties

Defendant-appellant O.S.G. Tap and Die, Inc. (OSG) is a business corporation organized under the laws of the State of Illinois in 1968. It is the wholly-owned subsidiary of a Japanese manufacturer and, commencing in 1968, has distributed in the United States taps and dies made by its Japanese parent (4TC-9TC).<sup>\*</sup> Plaintiff-appellee Gerald Flammia is a resident of New York who, from 1967 to 1973, was the President of Sossner Tap & Tool Corporation (Sossner), a small company located in New York. Former defendant MITE Corporation (MITE) is a Connecticut corporation.

##### B. Plaintiff's Employment by Sossner

Flammia first went to work for Sossner in 1948 as a factory superintendent. In 1952, he purchased ten per cent of the shares of Sossner and became its Vice President; in 1967, on

---

\* Citations followed by "TC" refer to pages in the transcript of testimony taken in this case on April 16, 1976 which have been designated as part of the record on this appeal but have not been included in the Joint Appendix.

the death of Ted Sossner, he became president of Sossner (135A-39A). Between 1948 and 1967, while Ted Sossner was President, Sossner's sales grew from approximately \$125,000 to \$1.9 million (145A). During the period 1967-73, while Flammia was President, Sossner's sales leveled off, rising only from \$1.9 million to \$2 million (142A, 145A, 257A). During the fiscal year ended February 28, 1973, the last full year in which Flammia was its President, Sossner had sales of \$2,045,000 and suffered a net loss of \$4,223 (26A).

In 1967, Heli-Coil Corporation purchased Sossner and retained Flammia as President under a 3-year contract, but reduced his salary from \$45,000 to \$35,000 (138A-39A). In 1970, former defendant MITE acquired Heli-Coil Corporation, including Sossner; Flammia was continued as President of Sossner at the same salary (245A). In 1972, Flammia participated in a sales incentive program and received an additional \$5,400 under this program (141A-42A). During this period, Flammia was most active in the manufacturing aspects of the business and relied on MITE personnel for financial and accounting information (265A).

C. Plaintiff's Attempt to Buy Sossner

In 1972, Flammia advised MITE of his belief that, without an infusion of capital greater than had been provided in prior years, Sossner would remain stagnant, but MITE refused to provide the additional capital requested (156A, 161A-62A). At this time, it was obvious to Flammia that MITE was trying to

sell Sossner -- a prospective Swedish purchaser was examining the company -- and Flammia was concerned about his own job security in the event of such a sale (163A-65A). MITE's proposed solution to Flammia's concerns was the suggestion, late in 1972, that Flammia might wish to purchase Sossner (165A-66A).

Pursuant to the suggestion of MITE, Flammia contacted his attorney and his accountant in order to put together a plan to purchase Sossner (169A). Flammia and his business advisors determined that a fair purchase price for Sossner was \$1.6 million (169A-70A, 285A-86A). When this was rejected by MITE, Flammia consulted another business advisor who came up with the same price of \$1.6 million which was again rejected (170A).

MITE advised Flammia that its objective was to recoup its investment in Sossner which amounted to approximately \$2 million (390A). As Flammia testified, "They kept looking for two million dollars, right around that figure" (170A-71A). When the negotiations died, Flammia resigned as President of Sossner by letter dated March 5, 1973 (171A).

After his resignation, Flammia contacted three different companies and advised them of the \$2 million purchase price of Sossner. Flammia approached these companies not as a finder, but in the hope that they would assist him in a purchase of Sossner (177A, 101T-02T).\* Two of these companies reviewed the

---

\* Citations followed by "T" refer to pages in the transcript of testimony taken on December 15, 16 and 17, 1975 which have been designated as part of the record on appeal but have not been included in the Joint Appendix.

matter and turned the deal down (176A-77A); the third company was still reviewing the matter some months later when Sossner was acquired by OSG (101T-03T).

D. Plaintiff's Meeting with OSG

In April 1973, Flammia formed his own corporation known as the Pioneer Tap Company but decided to take it easy, after his years of hard work, during the summer of 1973 (176A). In connection with starting up Pioneer, however, and in order "to see some of my old friends", he went to a convention of the tap industry in Chicago in May 1973 (177A). While in Chicago, Flammia decided to visit the offices of OSG in Elmhurst, Illinois, to investigate the possibility of buying semi-finished taps from OSG which he would then finish and sell under his own brand name (177A). On May 14, 1973, Flammia went to the OSG office where he was introduced to Robert Zoppelt, Vice President of OSG in charge of sales. Flammia had not known Zoppelt (or anyone else at OSG) previously. After a general discussion of the cutting tool business, Flammia asked Zoppelt whether OSG was interested in acquiring Sossner (178A-79A, 288A). In response, Zoppelt called Terry Osawa, President of OSG, and Flammia and Zoppelt went to Osawa's office to discuss the matter (179A-80A).

In Osawa's office, Zoppelt, Flammia and Osawa discussed in general terms the possibility of OSG's interest in Sossner, including the various advantages to OSG. Zoppelt and Osawa indicated that it was premature for OSG to be considering an acquisition such as Sossner, but there was talk that Flammia

would be the chief operating officer if Sossner was acquired. Flammia volunteered that he would be willing to invest \$100,000 in the stock of Sossner if it should be acquired (182A-88A, 291A-92A). Flammia was sure that Sossner could be purchased for \$2 million (185A). Although he considered \$1.6 million to be a fair price for Sossner, Flammia testified that he believed that a purchase by OSG at \$2 million was really the equivalent of \$1.6 million because of the yen-dollar exchange rate (285A).

In suggesting that OSG consider the acquisition of Sossner, Flammia had no intention of acting as a finder (254A); his major interest was to return to Sossner with a long-term executive position (273A, 291A 316A).

During the meeting, Flammia furnished a copy of a forecast for Sossner's fiscal years 1973-74 to OSG (184A-85A). Flammia testified that there was no chance to digest or discuss the forecast at that meeting (189A, 263A-65A). In many ways, the forecast is inadequate or incomplete as a basis for analyzing a proposed acquisition (429A-30A, 500A).

In order to find out whether Sossner was still for sale, Flammia then placed a telephone call to Leo Brancato, MITE's Executive Vice President. Brancato said that MITE was not actively seeking to sell Sossner but that he would mull the idea over (192A, 392A).

E. Communications between Plaintiff and Defendants, May 16-May 23, 1973

On May 16, after obtaining authority from OSG, Flammia telephoned Brancato and told him that OSG was the party potentially

11

interested (198A-99A). Flammia confirmed this by letter to Brancato dated May 17, 1973 (20A). Flammia also wrote a letter on the same day to Osawa at OSG. In that letter, he confirmed that he had given to Brancato the names and telephone number of Osawa and Zoppelt and stated that Brancato had promised to get in touch with him (21A). \* On May 24, 1973, Zoppelt replied to Flammia's letter to Osawa and, inter alia, thanked Flammia for making contact with Sossner (22A-23A). Brancato then wrote directly to OSG, supplying financial data for Sossner and setting out MITE's asking price of \$2,067,078 (24A-26A). After the initial telephone calls on May 14 and May 16, 1973 and the preliminary correspondence, Flammia did not participate in any of the subsequent negotiations although he did call both parties to find out what was going on (272A).

F. Plaintiff's Request for a Finder's Fee

On June 4, 1973, Flammia sent a letter to MITE (28A) in which he requested a finder's fee for services he had performed on MITE's behalf (205A). MITE responded by letter dated June 6 (29A) that Flammia had not been authorized to act on its behalf and that it would not pay Flammia a finder's fee. Despite MITE's rejection of his request for a finder's fee, Flammia never asked for a finder's fee from OSG; his expected reward from OSG was that he would become president of Sossner and own a

---

\* Brancato denied that he had agreed to get in further touch with Flammia since he was opposed to discussing the matter with or negotiating through Flammia and would only discuss the matter with OSG (304A-05A, 394A).

stock interest in it (93A).

G. Plaintiff's Prospective Employment

On June 11 or 12, 1973, Zoppelt and Osawa came to New York to look at the Sossner facilities and to discuss the proposed acquisition of Sossner with MITE executive (210A). During the trip, Zoppelt met with Flammia and asked him to set forth what kind of employment terms he wanted if Sossner was acquired by OSG (212A). Flammia wrote out his proposed terms in a memo, dated June 13, 1973 (34A-37A). Flammia's memo included numerous provisions which were unacceptable to OSG, including the profit-sharing term which stated as follows:

"Bonus based on profit suggested - 50% of profit after taxes after 1st 5% for company - "

The memo also outlined requests concerning salary, unvouchered expense accounts, pension plan, a car, payment of personal phone bills, and the term of the employment contract. None of these matters had previously been agreed upon between Flammia and OSG (298A-99A). Flammia's memo further indicated that a "special arrangement" would have to be worked out with regard to Flammia's proposed \$100,000 investment because his funds were invested in stocks and bonds, the value of which had depreciated, and Flammia would not sell them at a loss (222A-23A).

Zoppelt told Flammia that he disagreed with the proposals in the memorandum (220A-224A) but agreed to take them up with Osawa. As soon as Osawa reviewed Flammia's memo of June 13, 1973, he determined that Flammia was not the man to be Sossner's chief executive if OSG acquired it (32 TC).

#### H. Acquisition of Sossner

On June 15, 1973, Osawa and his father, the founder of OSG's Japanese parent, visited the Sossner plant. After review of the existing plant and its problems, they decided that they were interested in pursuing the matter further with MITE (28-31 TC). They visited MITE and made an offer of \$2 million for Sossner which MITE accepted. On June 27, a Letter of Intent was signed and the sale was consummated on August 1, 1973 (564A-65A).

After determining that Flammia was not an acceptable chief executive officer for Sossner, OSG negotiated with and, on June 27, 1973, hired Warren Demery, Flammia's successor at Sossner, to serve as President of Sossner (226A, 32-33 TC).

#### I. Further Negotiations with Plaintiff

In early July 1973, OSG entered into further negotiations with Flammia and offered him the position as Sossner's vice president in charge of manufacturing at a \$30,000 salary plus profit sharing (40A-41A). OSG offered Flammia this position because OSG believed that Flammia was technically capable but was weak in the areas of finances, accounting and marketing (536T, 36 TC).

On July 5, 1973, Demery talked with Flammia with regard to the offer of employment (582TA-86TA). As a result of

the negotiations, an agreement was reached on all terms except the length of the contract. Demery offered Flammia a one-year contract but Flammia rejected the offer because he wanted at least an 18-month term and preferably two years (234A, 237A, 303A, 585TA-87TA).

J. Qualifications of Expert Witnesses

At trial, plaintiff called Dr. Aaron Warner, an economist, lawyer and Dean of the Columbia School of General Studies, as an expert to give his opinion as to the value of plaintiff's services as a finder. During Dr. Warner's distinguished career, he has specialized in the fields of labor law, labor economics, industrial organizations and economic theory. He teaches courses in industrial relations and industrial organization, including antitrust problems. He is associated with a consulting firm that evaluates the services of people in death cases (319A-21A, 355A-57A). However, Dr. Warner does not himself engage in merger or acquisition work (357A), has no idea as to the fees customarily charged by investment bankers or banks for such services (360A-61A), and has never participated in a transaction involving a finder's fee (362A). The district court overruled defendant's motion to strike Dr. Warner's testimony (386A-87A).

Defendant called Alan Sternlieb as its valuation expert. Sternlieb is a partner and managing director of Lehman Brothers and an experienced investment banker who has participated in

over 100 mergers and acquisitions, closing over 20 of them (408A-10A). He has participated in transactions involving finders (527A-29A) and is familiar with the practices of other firms in the area of acquisitions (424A-25A).

K. Expert Opinions as to Value

Dr. Warner testified that, in his opinion, Flammia's services were worth \$190,000 to OSG, broken down as follows:

- a. \$90,000 for a finder's fee (346A);
  - b. \$30,000 as an "arbitrary figure" for Flammia's services in revealing to OSG the "reserved price" of MITE and saving OSG from paying a premium (346A-47A);
  - c. \$20,000 which he would "arbitrarily assess" for the saving of time and expense of OSG executives in finding Sossner (347A);
- and
- d. \$50,000 for providing information about Sossner to OSG (347A-49A).

It was Sternlieb's opinion that Flammia's services were worth \$22,500, computed as 25% of the full fee that an investment banker would have charged for handling the acquisition of Sossner by OSG (423A-28A, 527A). The full fee of \$90,000 that would have been charged by an investment banker would have included the following services: a) a review of the buyer's requirements and objectives; b) a review of all of the companies

in the industry in which the buyer was seeking to make an acquisition; c) an enumeration of the possible candidates for acquisition based upon available information; d) contacting potential companies to be acquired; e) preparation of a detailed memorandum about the acquisition candidate's business for the buyer and f) negotiation of the transaction (459A-61A, 574A-75A). Since Flammia provided only a fiscal forecast of limited usefulness (429A-30A, 576A), a telephone introduction to one acquisition candidate and information as to MITE's asking price, Flammia's services were worth \$22,500 (438A-39A, 448A, 527A-28A).

It is difficult to determine which of the elements of damage specified by Dr. Warner were adopted by the district court since no combination of his four component figures (\$90,000; \$30,000; \$20,000; \$50,000) add up to the damage award of \$130,000 in the court below.\*

---

\* The district court also discussed the "so-called opportunity cost" to plaintiff [to which Dr. Warner could ascribe no specific value (350A, 382A)] and certain elements in apparent mitigation of plaintiff's damages.

## ARGUMENT

### POINT ONE

THE ALLEGED AGREEMENT BETWEEN FLAMMIA  
AND OSG WAS BARRED BY THE STATUTE OF  
FRAUDS, N.Y.G.O.L. § 5-701(10), AND  
THE DISTRICT COURT ERRED IN HOLDING  
THAT THERE WERE MEMORANDA SUFFICIENT  
TO SATISFY THE STATUTE

The district court's decision of October 6, 1975 that plaintiff's cause of action was not barred by the New York Statute of Frauds, General Obligations Law § 5-701 was predicated on two grounds. First, the court determined that there should be a trial as to the existence of a joint venture contract which was outside the scope of § 5-701 (103A). Second, the court reasoned that signed memoranda introduced by the parties and relating to their dealing satisfied the requirements of the statute. (110A-14A).

In its memorandum and order of July 14, 1976, the district court failed to find the elements necessary to establish a joint venture. Thus, the question is squarely presented as to whether the court erred in holding that there were memoranda sufficient to satisfy § 5-701(10). As the court improperly considered memoranda written by plaintiff in reaching this conclusion and, in any event, the memoranda were insufficient to satisfy the requirements of § 5-701, that decision should be reversed.

A. The District Court Improperly Relied Upon Letters  
Prepared by Plaintiff and Not Subscribed by Defendant

Section 5-701(10), a copy of which is annexed hereto as appendix A, explicitly provides that contracts to pay compensation for services rendered in connection with the sale of a business are void unless evidenced by a sufficient writing which is "subscribed by the party to be charged therewith" (emphasis added).<sup>\*</sup> This requirement ensures that courts enforce only those obligations upon which the parties have agreed. "Where the writing has been prepared by one other than the party to be charged, there is no assurance that the document represents an accurate rendering of a mutually agreed upon understanding". Brause v. Goldman, 10 A.D.2d 328, 199 N.Y.S.2d 606, 614 (1st Dept. 1960), aff'd, 9 N.Y.2d 620, 210 N.Y.S. 2d 225 (1961). Thus New York courts have consistently refused to rely upon documents or memoranda

---

<sup>\*</sup> Plaintiff may not avoid the requirements of the Statute of Frauds, G.O.L. § 5-701(10), by bringing a claim for restitution rather than for damages under an express contract. The New York Court of Appeals recognized in Minichiello v. Royal Business Funds Corp., 18 N.Y.2d 521 277 N.Y.S.2d 268, (1966), cert. denied 389 U. S. 820 (1967), that "(i)n 1964, the Legislature amended subdivision 10 (§ 5-701(10)) to clearly apply the section to finders and to preclude any recovery in quantum meruit". 277 N.Y.S.2d at 270. The statute thus provides that it applies "to a contract implied in fact or in law to pay reasonable compensation". See Klein v. Smigel, 44 A.D.2d 248, 354 N.Y.S.2d 117 (1st Dep't 1974), aff'd, 36 N.Y.2d 809, 370 N.Y.S. 2d 897 (1975).

prepared by plaintiffs that are not authenticated by or shown to contain the agreement of the parties referred to in a writing subscribed by defendant. See Behrman v. Peoples Camp Corp., 30 A.D.2d 973, 294 N.Y.S.2d 658 (2d Dept. 1968), aff'd, 25 N.Y.2d 920, 304 N.Y.S.2d 853 (1969); Solin Lee Chu v. Ling Sun Chu, 9 A.D.2d 888, 193 N.Y.S.2d 859 (1st Dept. 1959) ("[t]o permit the unsigned document prepared by the plaintiff to serve as a portion of the requisite memorandum would open the door to evils the Statute of Frauds was designed to avoid"); Crabtree v. Elizabeth Arden Sales Corp., 304 N.Y.48, 55-56, 110 N.E.2d 551 (1953). See also Karlin v. Avis, 457 F.2d 57, 62 (2d Cir.), cert. denied, 409 U.S. 849 (1972) ("(i)n New York unsigned writings prepared by a plaintiff, without more, do not suffice to bind a defendant").

Notwithstanding the applicable New York law, the district court in the instant case relied primarily on letters written by plaintiff in its determination that memoranda sufficient to satisfy § 5-701 had been introduced, citing Morris Cohon & Co. v. Russell, 23 N.Y.2d 569, 297 N.Y.S.2d 949 (1969) for authority. The court's reliance was misplaced. In Morris Cohon, the contract between the buyer and seller, a contract in whose preparation plaintiff played no role, specifically represented that the parties "have dealt with no other person or persons than Morris

Cohon & Co. as broker or finder." 23 N.Y.2d at 573. The court found that "the contract clause constitutes an admission by defendant that plaintiff performed services and that an obligation to plaintiff actually existed." 23 N.Y.2d at 575. There is no such admission of an obligation, signed by the defendant, in this case.

The district court first considered letters sent by Flammia to Osawa at OSG and Brancato at MITE on May 17, 1973 (111A-12A). These letters revealed that Flammia had contacted MITE concerning the latter's willingness to sell Sossner and had disclosed that OSG was an interested buyer. Flammia informed Osawa that he expected to hear further from Brancato and that he was enthusiastic about the possibilities of a merger between OSG and Sossner. In the only letter from defendant relied upon by the court, OSG responded to Flammia, confirming its interest in a possible acquisition and thanking Flammia for "making the contact at Sossner" (113A). There is nothing in this letter to indicate that plaintiff had been employed to render services as a finder or that defendant admitted any obligation as a finder to him; see pp.24-27, infra.

The court also relied upon letters of June 2, 1973, in which Flammia remarked that he was "putting off any final decision to start making" his own taps to avoid "confusing

the possible deal"; June 4, 1973, in which Flammia requested a finder's fee from MITE; and June 13, 1973, in which Flammia set forth proposed conditions for employment (114A).

The perils of using a plaintiff's letters to determine compliance with § 5-701 are demonstrated in this case where Flammia's letters distorted his role in the negotiations that preceded the sale of Sossner. Although plaintiff's letter to Osawa of May 17 stated that Brancato would be getting in touch with him (Flammia) soon, and thus portrayed plaintiff as an intermediary through whom negotiations would take place, Brancato denied that he had ever indicated that he would contact Flammia (394A-95A) and Flammia admitted that if Brancato had called him, it was only to obtain again the names of the OSG officers that Brancato had already received (296A).

Similarly, Flammia's letter of June 2, 1973, in which he stated that he was delaying "any final decision to start making taps" to avoid "confusing the possible deal" (27A) is simply self-serving. Flammia's own testimony reveals that his efforts on behalf of his own company, Pioneer, were dormant at the time he wrote the letter:

Q (Mr. Ledwith): Now, in connection with getting Pioneer off the ground, what did you do?

A (Mr. Flammia): Well, as I say, I started to make plans to work with a competitor down in Pennsylvania to furnish me what are called blanks and I would finish them up, and the day that I started to go down there I didn't get out of Long Island for three hours because of some rain, so I turned around and went home.

I decided, well, I put it off for probably --I put it off for the whole summer to take it easy after all of this work for all of these years, and that is what I did.

(176A).

Any reliance by the district court on Flammia's June 4 letter to Brancato and June 13 memorandum to Zoppelt for compliance with the Statute of Frauds is obviously misplaced. The former letter is a request for a finder's fee from MITE, a request so inconsistent with Flammia's claim to be a finder for OSG that it can only serve as evidence of the absence of agreement to that effect (28A). The June 13 memorandum (34A-37A), far from expressing any agreement between OSG and Flammia, was specifically rejected by OSG (220A).

Thus, the district court's reliance on writings prepared by plaintiff and not subscribed by the defendant has defeated the requirements of certainty that § 5-701(10) was intended to serve. The statute was intended to cover controversies over commissions that "are commonly resolved by juries on conflicting testimony, with the consequent danger of erroneous verdicts". 1949 Report of N.Y. Law

Review Comm. 615. That goal can only be met by holding plaintiff to compliance with the clear terms of the statute.

B. The Writings Considered by the District Court were Insufficient to Satisfy the Statute of Frauds

Even considering all of the correspondence between plaintiff and defendant OSG, the court below erred in finding sufficient compliance with § 5-701(10).<sup>\*</sup> The court must still find that the writings "evidence the fact of plaintiff's employment by defendant to render the alleged services." Morris Cohon & Co. v. Russell, *supra*, 23 N.Y.2d at 575-576 (1969)<sup>\*\*</sup> In elaboration of that requirement, the court in the Morris Cohon case said that the memorandum there at

---

\* Where the record upon which the district court made its decision consisted only of pleadings, depositions and written exhibits, as was the case here, this court may, in its discretion, review it de novo. Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir.) cert. den., 340 U.S. 810 (1950).

\*\* The district court heavily relied upon the Morris Cohon & Co. case for the proposition that written memoranda of a contract to employ a finder may suffice to remove the contract from § 5-701(10) even though the memorandum does not evidence agreement as to the rate of compensation. While the court in Morris Cohon did distinguish the previous case of Minichiello v. Royal Business Funds Corp., 18 N.Y.2d 521, 277 N.Y.S. 2d 268 (1966), cert. denied, 389 U.S. 820 (1967), as one in which "there is a complete absence of any memorandum", the court did not hold that any memorandum would satisfy the requirements of the statute. See, Intercontinental Planning Ltd. v. Daystrom, Inc., 24 N.Y. 2d 372, 300 N.Y.S.2d 817 (1969). Rather, the court allowed recovery only after finding that the requirement as to employment as a finder had been satisfied.

issue "identifies the buyer, it identifies the defendant as one of the sellers, it establishes the fact of the plaintiff's employment, it identifies the plaintiff as the broker, it establishes the subject matter of the transaction and, most important, it acknowledges performance by the plaintiff in bringing about the sale ..." 23 N.Y.2d at 576. It is only after these essential elements of the contract have been confirmed that the court may entertain a claim in quantum meruit for the reasonable value of plaintiff's services.

The writings in this case fall far short of enunciating the essential elements of the employment of the plaintiff to perform finder's services required by Morris Cohon. Zoppelt's letter, dated May 24, 1973, expressed OSG's interest in the possible acquisition of Sossner, told Flammia that OSG looked forward to hearing the results of his further discussions with Brancato and thanked him for making the contact at Sossner (22A-23A). No mention is made of any employment of Flammia as a finder or of any expectation that he would be paid as finder; nor do Flammia's letters to OSG refer to any such employment. These letters are completely consistent with what the rest of the evidence discloses, namely, that OSG was interested in a possible acquisition and that Flammia expected as a reward for his assistance an executive position in the acquired company. In brief, while Morris Cohon permits a court to imply an obligation to pay

for a finder's or broker's services where the defendant has acknowledged that plaintiff was retained to and did perform such services, no writing in this case specifies employment or performance that could support a claim for compensation as a finder.

Indeed, in light of the fact that Flammia specifically sought a finder's fee from MITE but refrained from asking for one from OSG, it is clear that Flammia did not consider himself to be a finder vis-a-vis OSG or expect compensation for his services (at least until after his employment expectations were disappointed in mid-June, 1973). Flammia's request to MITE is consistent with other evidence that while plaintiff may have technically "found" Sossner for OSG, he did so without any agreement or expectation that he would be compensated as a finder by OSG.

Thus, at a pre-trial deposition, Flammia testified that he had not requested a fee from OSG, but that "my finder's fee was the fact I was going to go to work there and do exactly what I wanted, I guess, all the time." (EBT of G. T. Flammia, December 30, 1975 at 26-27; see 93A fn, 595A). At trial, Flammia further testified:

Q (Mr. Ledwith): And was there any discussion between you and Mr. Zoppelt about working with Sossner or developing Sossner, & if so, what was said?

A (Mr. Flammia): Well, I was supposed to be the President of the Company and to operate the thing to the best of my ability . . . (189A).

\* \* \*

Q (Mr. Lamberton): Were you operating as a finder in this particular occasion, Mr. Flammia?

\* \* \*

A (Mr. Flammia): I believed that I acted as a finder after I discussed it, yes, but I had no intention of going out to do this. I said so in my letters. I didn't go deliberately to sell Sossner.

Q: But you had no intention of going out and acting as a finder, did you?

A: Absolutely no, no, sir. I had absolutely no intention of acting as a finder. I won't repudiate what I said in the letters. I had no intention of being a finder or dealing. I just saw a very good deal and I went for it. (253A-54A)

In these circumstances, plaintiff had, at most, "an undefined intimation that he would be taken care of" for his preliminary role in introducing a buyer and seller, and his failure to reach a more concrete understanding with OSG now bars him from any relief as a finder. See Klein v. Smigel, 44 A.D.2d 248, 250, 354 N.Y.S.2d 117, 120 (1st Dept. 1974). aff'd, 36 N.Y.2d 809, 370 N.Y.S.2d 897 (1975); cf. Yonofsky v. Wernick, 362 F. Supp. 1005, 1036 (S.D.N.Y. 1973).

Flammia's situation closely resembles that of the purported finder in Bloomgarden v. Coyer, 479 F.2d 201 (D.C. Cir. 1973), where there was no dispute that plaintiff had introduced the parties to an acquisition and assisted in the exchange of information between them. The evidence, however, indicated that plaintiff had performed not pursuant to an agreement for compensation as a finder, but in the hope that a

company of which he was president might obtain some business advantage from the new enterprise. The court of appeals, therefore, affirmed a grant of summary judgment denying plaintiff any finder's fee.

Similarly, no writing in this situation suggests that Flammia acted in any capacity other than that of an ex-officer of a corporation who hoped to regain his old position; as Flammia testified, "[M]y basic and primary interest in the whole transaction, that is, just to get back. . . . [Sossner] was my baby and I wanted to give it all I could" (316A). Even if the paucity of information indicating the existence of an agreement for Flammia to act as a finder does not conclusively demonstrate that plaintiff was, in a legal sense, a volunteer who was not entitled to compensation, Barrett v. Lang, 243 App. Div. 35, 276 N.Y.S.297, Hoschke, 53 App.Div. 327, 65 N.Y.S. 638, 639 (2d Dept. 1900); Black v. Vaeth, 285 N.Y.S.2d 557, 561-62 (City Ct. Oneida Co. 1967), it most certainly demonstrates the absence of essential terms necessary to satisfy § 5-701(10).

POINT TWO

THE DISTRICT COURT ABUSED ITS DISCRETION  
IN ADMITTING AS AN EXPERT WITH RESPECT TO  
THE VALUATION OF SERVICES A WITNESS WHO  
HAD NO EXPERIENCE IN SIMILAR TRANSACTIONS  
AND THE COURT ERRED IN GRANTING RECOVERY  
BASED ON THE VALUE OF PLAINTIFF'S SERVICES  
TO OSG.

---

Even if plaintiff's claim was not barred by the Statute of Frauds, the damage award of \$130,000 was grossly in excess of any proper recovery. As this award was based on improperly admitted testimony and an erroneous application of law concerning damages for implied contracts, the recovery must be set aside.

A. The Admission of Plaintiff's Expert Testimony  
was an Abuse of Discretion

To establish his theory of damages, plaintiff obtained testimony from Dr. Aaron Warner, a professor whose major fields of interest are economic theory, labor economics and industrial organization (320A) and a consultant in the evaluation of people's services and lives in accident and death cases (355A). Generally, the admission of a witness as an expert lies within the sound discretion of the trial court.\* See King v. Deutsche Dampfs-Ges, 523 F.2d 1042, 1045 n. 2 (2d Cir. 1975); Tropea v. Shell Oil Co., 307 F.2d 757, 763 (2d Cir. 1962). Nevertheless, this Circuit has

---

\* For the standard of review of a discretionary judgment, see Carroll v. American Federation of Musicians, 295 F.2d 484, 488-89 (2d Cir. 1961).

consistently analyzed the exercise of that discretion by reference to the witness' training or experience in the area about which he expects to testify. See United States v. Bermudez, 562 F.2d 89, 97-98 (2d Cir. 1975); Tropea v. Shell Oil Co., supra; Olsen v. Realty Hotel Corp., 210 F.2d 785 (2d Cir. 1954). Only if the witness can demonstrate that his training and experience endow him with knowledge of the subject matter will he be able to fulfill his role of assisting the court to determine the truth of an issue in dispute. See Jenkins v. United States, 307 F.2d 637, 643 (D.C. Cir. 1962) (en banc); Fed.R. Evid. 702; 7 J. Wigmore, Evidence § 1923 (3d ed. 1940); 3 J. Weinstein, Weinstein's Evidence § 702[1] (1975).

A witness who has no experience in transactions similar to the one upon which he is asked to comment is not qualified as an expert. See Havenfield Corp. v. H. & R. Block, Inc., 509 F.2d 1263, 1272-73 (8th Cir.), cert. denied, 421 U.S. 999 (1975). Nor will experience with tangential matters qualify a witness as an expert with respect to an issue of which he has no direct knowledge. See Jones v. United States, 387 F.2d 1004 (10th Cir. 1967), cert. denied, 392 U.S. 927 (1968); Motorola, Inc. v. Fairchild Camera and Instrument Corp., 366 F.Supp. 1173 (D. Ariz. 1973).

Given these standards, it was an abuse of discretion for the district court to accept testimony from Dr. Warner on the value of Flammia's services. Dr. Warner admitted that he had never engaged in the work of a finder and had never

participated in a transaction involving a finder's fee (362A). His experience with mergers and acquisitions was limited to his teaching of the antitrust implications of such business transactions (356A-357A), and nothing in his background reveals training or experience as to the customary compensation paid for assisting in an acquisition (358A-362A). Indeed, Dr. Warner's lack of expertise in this area was affirmatively demonstrated by his failure to distinguish between finder's and broker's services and fees, his double counting of elements of damages for the same services and his use of a damage factor that patently had no place in this case; see pp. 36-39, infra. It was error for the court below to refuse to strike his testimony (386A-87A).

B. The District Court Failed to Consider the Market Value of Flammia's Services and thereby Applied an Improper Measure of Damages

Plaintiff's contention that he is entitled to quantum meruit recovery for services rendered in connection with the sale of Sossner requires proof either that the parties had reached an understanding regarding employment, thus establishing a contract implied-in-fact, or that, despite the absence of an agreement by the parties, defendant inequitably obtained a benefit from plaintiff's performance so as to require that the court imply the existence of a contract, or recovery in quasi-contract. Robbins v. Frank Cooper Associates, 19 App. Div.2d 242, 241 N.Y.S.2d 259 (1st Dep't 1963), rev'd

on other grounds, 14 N.Y.2d 913, 252 N.Y.S.2d 318 (1964).

Although either theory of implied contract may support a claim for quantum meruit, the measure of damages for each is different. In the present case, the district court erroneously disregarded the market value of plaintiff's services and applied the measure of damages for quasi-contract to a contract implied-in-fact. Therefore, a remand is required for a proper assessment of damages.

In Robbins, supra, plaintiff alleged that defendants had utilized his original idea in the production of its television program. Plaintiff claimed to be entitled to recovery under either a theory of contract implied-in-fact or of contract implied-in-law. The court was careful to distinguish the two theories and the proof required as to each:

"[i]n the factually implied contract the measure would be what the defendants are presumed to have contracted to pay, namely the reasonable value of the material. If recovery is based on quasi-contract, the damage is defendants' unjust enrichment -- what they actually profited from the use of the material."

19 App.Div.2d at 244; 241 N.Y.S.2d at 261. Thus, in the case of a contract implied-in-fact, damages are measured by the value for which the parties are considered to have contracted, i.e., the market value of the services. Only where the contract is one implied-in-law may the court consider the benefit received by the defendant. Accord, Havenfield Corp. v. H & R Block, Inc., supra, 509 F.2d at 1268-71

(customary fee awarded for contract implied-in-fact); Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631, 634 (2d Cir. 1946). See Naimoli v. Massa, 81 Misc. 2d 431, 366, 573 (City Court 1975) (citing Robbins); 50 N.Y. Jur., Restitution and Implied Contracts, §§106, 107; 1 S. Williston, Contracts §3A (3d ed. 1957).

In its opinion of October 6, 1975, the district court found that the writings exchanged among the parties constituted an agreement to compensate Flammia for services rendered in connection with the sale of Sossner. As the court stated:

"These communications, like those in Morris Cohon, sufficiently identify the seller; identify and establish plaintiff's role in the negotiations; establish the subject matter of the transaction; and, most important, acknowledge performance by and obligation to the plaintiff as a consequence of his assistance in arranging the sale of Sossner. [citations omitted] They are sufficient to support a claim for compensation under a theory of quantum meruit."

(114A-15A).

The opinion necessarily indicates the court's finding that the parties had reached an agreement that established the fact of plaintiff's employment by OSG as a finder, obligating defendant to pay reasonable compensation for the services rendered. The opinion does not find that the court was implying an equitable obligation where the parties intended none. Thus, although the district court's memorandum and order of July 14, 1976 classified

the instant situation as "something of a hybrid" of implied-in-fact and implied-at-law contracts (598A), the record does not support an inference of quasi-contract. Any award of damages, therefore, should have been predicated on the reasonable value that defendants were presumed to have contracted to pay, i.e., the market value of Flammia's services. See, Robbins, 19 App. Div. 2d at 244-245; 241 N.Y.S.2d at 261.\*

Of the two valuation witnesses, only defendant's expert, Alan Sternlieb, had the background, experience and knowledge in connection with finders and brokers to testify to the customary value of services such as those rendered by plaintiff. Dr. Warner, plaintiff's expert, valued Flammia's services not by their customary value in the market place but by their presumed and special value to defendant OSG (384A-85A). This necessarily meant that Dr. Warner's opinion as to damages was based on the presumed enrichment of OSG arising from Flammia's services, not on an objective market standard.

Similarly, the district court looked not to the market value of the services rendered by the plaintiff but

---

\* The court in Robbins assumed that where there is no proof of market value to support a theory of contract implied-in-fact, recourse could be had to the unjust enrichment measure of damages. In this case, however, there was clear proof by defendant's expert as to the market value of plaintiff's services.

to a special value to OSG in excess of customary fees. The court stated.

"[P]laintiff may not be said to have been an ordinary 'finder'...plaintiff's knowledge and expertise in this particular matter were unique, were relied upon by the defendants and were of considerably more value than the service which might ordinarily be performed even by such a reputable, well-known firm engaged in the finder business as Lehman Brothers.

Thus the Court concludes that the plaintiff's services ... were more valuable to a potential buyer such as OSG than the services of the normal finder in a transaction of this kind." (603A-04A).

Because the Court's award is based on the benefits allegedly received by the defendant, i.e., its unjust enrichment in the circumstances of this case, rather than the relevant market value of plaintiff's services, a remand is required for the proper determination of damages.

#### POINT THREE

THE DISTRICT COURT'S FINDING OF  
\$130,000 IN DAMAGES WAS CLEARLY  
ERRONEOUS.

We submit that the district court's finding that the quantum meruit value of plaintiff's services of

\$130,000 was clearly erroneous.\* While the district court did not make specific findings as to the various elements comprising the total damage award, the finding was necessarily based upon the testimony of plaintiff's expert, Dr. Warner, who testified to a total valuation of \$190,000 for Flammia's services, rather than defendant's expert who valued them at \$22,500.

Dr. Warner claimed that the \$190,000 value of plaintiff's services consisted of five factors (346A-49A). First, Flammia's efforts obviated the need for OSG to employ a finder whose fee for a \$2,000,000 sale was estimated by Dr. Warner to be \$90,000, based upon 5% of the first million dollars of purchase price and 4% of the second. Second, Flammia's knowledge of MITE's selling price allegedly saved OSG from paying a premium estimated at \$30,000. Third, Flammia's services allegedly saved OSG executives \$20,000 worth of time in discovering a suitable acquisition candidate. Fourth, Dr. Warner contended that Flammia's knowledge of Sossner's operations eliminated uncertainty for OSG in evaluating the purchase price and this contribution was worth \$50,000.

---

\* "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).

Finally, Dr. Warner testified that Flammia had forfeited any opportunity he might have had to acquire a share in Sossner through other companies, although no value was fixed for the lost opportunity.

The serious error that tainted most of Dr. Warner's testimony was his failure to distinguish between the services performed by a finder and by a broker. A finder's function is to introduce a prospective buyer to a prospective seller. A broker, who acts as an agent for one of the parties, not only introduces the parties but also participates in the negotiations. Blackburn & Co. v. Park, 357 F.2d 525 (2d Cir. 1966); Knaus v. Kreuger Brewing Co., 142 N.Y. 70, 36 N.E. 867 (1894). A finder's and a broker's compensation are not the same:

"Due to the differences in the functions and areas of responsibility of brokers and finders, the compensation payable to each can vary quite substantially. Very often the party paying the commission will take the position that the compensation payable to a broker who actively participates throughout the negotiations should be considerably greater than the fee paid to a finder who does nothing more than introduce the parties." Bangser, Negotiations and Planning, in Business Acquisitions: Planning and Practice, Vol. 1, p. 7 (PLI 1971, Herz and Beller ed.).

The distinction between finder's and broker's services went unnoticed by Dr. Warner. It was clearly taken into account by defendant's expert Sternlieb who was familiar with acquisitions and testified that \$90,000 (the starting point for Dr. Warner's computations) constituted the market value for a full range of broker's services which included

the finder's services rendered by Flammia. He noted that, unlike a broker who would be compensated on a 5%-4% formula, Flammia had made no study of the industry, had not negotiated the deal, had not reviewed the buyer's requirements, and had provided OSG only with a forecast of Sossner's operations prepared earlier for a different purpose. Sternlieb therefore estimated the market value of Flammia's services --which were basically finder's services--at between \$20,000 and \$25,000.

Sternlieb's testimony reflected the analysis of the percentage market value formula for brokers accepted by the court in Havenfield Corporation v. H & R Block, Inc., supra. In that case, the court of appeals upheld a district court's instructions that permitted a jury to determine whether plaintiff's recovery should be predicated on the prevailing usage, custom, and practice in the investment banking business of fixing fees on a "declining percentage formula of 5-4-3-2-1" for each one million dollars of the sales price. 509 F.2d at 1270. The approved instruction, however, reveals that the services compensated under this formula include "identifying business opportunities for corporate acquisition, furnishing financial data thereon, arranging and attending a meeting of the parties to the potential acquisition, [and] introducing them." 509 F.2d 1270.

Next, Dr. Warner added a \$30,000 estimate by reason of the fact that Flammia had told OSG of the asking price of \$2,000,000, thus allegedly saving OSG from paying a "premium." Dr. Warner testified that according to his understanding:

"it is generally estimated that a premium price will be paid (by the buyer of a company)... over the purchase price, which varies from five to twenty per cent" (380A)

The basis for this conclusion was his reading of an article in "Acquisition and Merger Negotiation Strategy" by Mark Strage (381A-82A). However, a review of that text, which was read into the record (434A-36A) reveals that such a premium arises only in connection with tender offers for the publicly held shares of a corporation. The text cited by Dr. Warner has no application to the negotiated sale of a wholly-owned corporation such as Sossner (437A).

The third and fourth elements of value to which Dr. Warner testified were \$20,000 for finding Sossner and saving OSG the expense of having to search for it and \$50,000 for providing information about Sossner to OSG. Here again, Dr. Warner's lack of knowledge of finder's as opposed to broker's services fatally undercut his estimate and led to double counting. While his estimate of Flammia's value as a finder at this stage was slightly less generous than Sternlieb's (\$20,000 as opposed to \$20-\$25,000), Dr. Warner had already estimated a value for finder's services of \$90,000 as his first element of damage. Secondly, he was apparently unaware

that his first element of damages also included any fee for the information providing function.

As Sternlieb's testimony demonstrated, the role of a broker who earns his full fee of \$90,000 is precisely to find and make a study of the target company and to supply the relevant information to his client, thereby saving the client the time, effort and risk of performing these necessary functions itself.\* To award a full broker's fee and then add an additional sum for each component part of the services included within it is impermissibly to allow double recovery. See Sperry-Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4th Cir. 1971), cert. denied, 405 U.S. 1017 (1972); Neill v. Diamond M. Drilling Co., 426 F.2d 487 (5th Cir. 1970); United States v. Horsfall, 270 F.2d 107 (10th Cir. 1959).

Finally, Dr. Warner testified to an additional value, which he was unable to quantify, arising out of Flammia's forfeiture of any opportunity he might have to acquire shares in Sossner through another company. Since Flammia had been singularly unsuccessful in interesting

---

\* While plaintiff's experience with and knowledge of Sossner would have made him a useful officer for OSG, it is not clear why these characteristics would have made him a more qualified finder, as concluded by the district court (603A). Indeed, his conflict of interest between acting for OSG and wanting to serve as president of Sossner, and his failure to survey all possible acquisitions for OSG demonstrate that his services as a finder did not warrant extraordinary compensation (470A-71A).

companies other than OSG in paying \$2,000,000 for a corporation with gross sales of about \$2,000,000 and no earnings, his inability to fix a value for this "opportunity cost" is understandable.

While the court below reviewed all of the factors cited by Dr. Warner and had "the impression . . . that Mr. Sternlieb's estimate discounted much that should be due to plaintiff" (603A), it did not set forth how it arrived at the specific award of \$130,000. Indeed, no combination of the four figures given by Dr. Warner (i.e., \$90,000, \$30,000, \$20,000 and \$50,000) make up the court's award.

We submit that a fair review of the damage testimony of plaintiff's economic expert and of the merger specialist put on by the defendant can only lead to the firm conclusion that a mistake in the award of \$130,000 as damages has been committed. See U.S. v. Twin City Power Co., 248 F.2d 108 (4th Cir. 1957), cert. denied, 356 U.S. 918 (1958).

#### CONCLUSION

We respectfully request that:

1) The orders of the district court, entered on October 6, 1976 and July 15, 1976, be reversed and judgment be entered for defendant-appellant on the ground that New York General Obligations Law § 5-701(10) bars plaintiff-appellee's claim; or

2) The order of the district court, entered on July 15, 1976, be reversed and the case remanded to the district court for a new trial limited to the issue of damages.

Dated: New York, New York  
October 13, 1976

Respectfully submitted,

CLEARY, GOTTLIEB, STEEN & HAMILTON  
Attorneys for Defendant-Appellant  
OSG Tap and Die, Inc.  
One State Street Plaza  
New York, New York 10004  
(212) 344-0600

Of Counsel:

JAMES W. LAMBERTON

APPENDIX A

NEW YORK GENERAL OBLIGATIONS LAW § 5-701(10)

§ 5-701. Agreements required to be in writing

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

\* \* \*

10. Is a contract to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of any real estate or interest therein, or of a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest. "Negotiating" includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction. This provision shall apply to a contract implied in fact or in law to pay reasonable compensation but shall not apply to a contract to pay compensation to an auctioneer, an attorney at law, or a duly licensed real estate broker or real estate salesman. As amended L.1964, c. 561, eff. Sept. 27, 1964.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

----- x  
G. T. FLAMMIA, :  
Plaintiff-Appellee, : Index No. 76-7408  
-against- : AFFIDAVIT OF PERSONAL  
OSG TAP AND DIE, INC., : SERVICE  
Defendant-Appellant. :  
----- x

STATE OF NEW YORK )  
: ss.:  
COUNTY OF NEW YORK )

ARTHUR SELIGMAN, being duly sworn, deposes and says  
that he is over the age of eighteen years, is a Clerk in the  
employ of Cleary, Gottlieb, Steen & Hamilton and is not a  
party to this action.

That on the 13th day of October, 1976, he served  
upon Hanophy & Ledwith, Esqs., the attorneys for plaintiff-  
appellee two copies of a 3-volume joint appendix and two  
copies of defendant-appellant's brief by delivering them to  
and leaving them with a person then in charge of the office  
of the attorneys for plaintiff-appellee, located at 16 Rocklyn  
Avenue, Lynbrook, New York 11563.

Arthur Seligman  
Arthur Seligman

Sworn to before me this 13<sup>th</sup>  
day of October, 1976.

William A. Loeb  
Notary Public

WILLIAM A. LOEB  
Notary Public, State of New York  
No. 31-4630452  
Qualified in New York County  
Commission Expires March 30, 1978

Copy Ricd  
P. Ledwith Sr.